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No. 08- 081012

Supreme Court of the United States

LEE ANN KAY, parent of MASON KAY, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the United States Court of Federal Claims have subject matter jurisdiction in the Vaccine Compensation Program to award attorneys' fees and costs pursuant to 42 U.S.C § 300aa-15(e) when a petition for compensation is untimely filed under 42 U.S.C. § 300aa-16(a)(2)?

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On November 10, 2008, pursuant to Federal Circuit Rule 36, the United States Court of Appeals for the Federal Circuit affirmed the decision of the United States Court of Federal Claims. *See* Appendix A, page 1a. No petition for rehearing was filed. Previously, on February 21, 2008, the United States Court of Federal Claims had affirmed the August 31, 2007 decision of a special master, reported in 80 Fed.Cl. 601 (USCFC 2008). *See* Appendices B-C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 300aa-12(a).

> The United States Court of Federal Claims and . . . special masters shall . . . have jurisdiction over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation.

Title 42 United States Code, Section 300aa-15(e)(1).

> If the judgment . . . does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim. . . .

The relevant provisions of 42 U.S.C. § 300aa-1 *et. seq.* are lengthy and, therefore, set out in the Appendix pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

The petitioner, Mason Kay ("Mason") was born on April 7, 1999. He filed a petition for compensation in the Vaccine Program on March 23, 2005, alleging he suffered speech delay and learning difficulties as a result of mercury-containing vaccines.[1] 5a. Subsequently, the respondent, the Secretary of Health and Human Services, examined Mason's petition in light of 42 U.S.C. § 300aa-16(a)(2),[2] the decision of the Federal Circuit in

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[1] Mason's Vaccine Program case for compensation for his injuries has been dismissed. However, he believes a brief recitation of the issues involved in his underlying case provides context for his petition for a writ of certiorari.

[2] The Vaccine Act, which established the Vaccine Injury Compensation Program, is located at 42 U.S.C. § 300aa-1 *et. seq.* For convenience, future references will be to the "Vaccine Act,"

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Brice v. Sec'y of HHS, 240 F.3d 1367 (Fed. Cir. 2001) ("*Brice I*"),[3] and the decision of the Court of Federal Claims in *Setnes v. Sec'y of HHS*, 57 Fed.Cl. 175 (USCFC 2003).[4] *See generally* Respondent's Motion to Dismiss and Response to the Special Master's November 7, 2005 Order ("Resp. Mot. ___."). The respondent then moved to dismiss Mason's petition as untimely, arguing that "the first sign or symptom of Mason Kay's condition occurred in or around July of 2000" when Mason was 15 months old. Resp. Mot. 3. In support of the motion, the

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the "Act" or the "Vaccine Program." Individual sections to the Act will include only the section number. Section 16(a)(2) provides: "no petition may be filed for compensation . . . after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset. . .of such injury."

[3] In *Brice I*, the Federal Circuit addressed § 16 (a)(2) ruling that equitable tolling is impermissible, as the Vaccine Act is a waiver sovereign immunity to be strictly construed. 240 F.3d 1367 (Fed. Cir. 2001).

[4] In *Setnes*, the petitioner, A.J. Setnes, filed a claim on July 15, 2002 alleging vaccines caused his autism. 57 Fed.Cl. 175, 176 (USCFC 2003). A special master dismissed the claim as untimely. The special master based the dismissal on statements by A.J.'s mother describing unusual behaviors (*e.g.* humming, babbling, kicking, screaming, eating cardboard) that occurred prior to July 15, 1999. *Id.* at 176-177, 181. The Court of Federal Claims reversed, stating that for purposes of § 16(a)(2), the proper test was when the medical community at large would have recognized that A.J.'s behavior was the first "manifestation of onset" of autism. *Id.* at 181. In A.J.'s case, the court held, the proper onset date was somewhere between July 16, 1999, when a medical record noted "concern about PDD" and January 7, 2000, when a record noted "probable PDD/autism." *Id.* at 180-181.

respondent cited a note by Mason's pediatrician, written in 2003 that stated:

> Interestingly, mom reports that [Mason's] language developed normally until around 15 months of age when he stopped talking altogether for over a year. This coincided with the family's move from Germany to Atlanta.

See Resp. Mot. 5.

The respondent also filed the expert report of Dr. S. Robert Snodgrass, a pediatric neurologist. *See generally* Respondent's Medical Expert Report of Dr. S. Robert Snodgrass ("Snodgrass Rep. ___.") . In his report, Dr. Snodgrass stated that Mason had a brain disorder that began prior to March 23, 2002. Snodgrass Rep. 4. In these circumstances, the respondent argued, Mason's untimely filing was a "jurisdictional bar" that prevented further proceedings. Resp. Mot. 6. Addressing *Setnes*, the respondent stated that this decision is "contrary to law and inconsistent with the interpretation of the statutory language that has governed proceedings under the Vaccine Act since the Program's inception." Resp. Mot. 7.

In response, Mason agreed with Judge Futey, who had observed in *Setnes:*

> As distinguished from other medical conditions, however, the beginning stage of autism cannot be reduced to a single, identifiable symptom. . . .Many of the initial 'symptoms' are subtle and can easily be

> confused with typical child behavior. . . .Where there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on 'the occurrence of the first symptom.'

Setnes, 57 Fed.Cl. at 179.

In such circumstances, Judge Futey stated, the proper standard to be used is that the statute of limitations does not begin to run until the manifestation of onset of the injury. *See* § 16(a)(2); *Setnes*, 57 Fed.Cl. at 179. In this regard, Judge Futey stated:

> 'Manifest' is defined as 'evident to the senses . . . obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident.' The court must, therefore, ascertain when the onset of autism was evident and, in turn, whether petitioner's petition for compensation was timely.

Setnes, 57 Fed.Cl. at 180.

On January 16, 2007, the special master ordered a hearing be held on February 26, 2007, "limited to issues affecting the special master's jurisdiction over the petition." Order of January 16, 2007, page 1. Prior to the hearing, however, on February 20, 2007, the Federal

Circuit issued an opinion in *Markovich v. Sec'y of HHS*,[5] that addressed, *inter alia*, the decision by the Court of Federal Claims in *Setnes*. In this regard, the Federal Circuit ruled, "[W]e hold that 'the first symptom or manifestation of onset,' for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." *Id.* at 1360.

Based upon the Federal Circuit's ruling in *Markovich*, the special master dismissed Mason's case. 27a-28a. In so doing, the special master ruled that the Vaccine Program "represents a waiver of sovereign immunity" that the "special master must construe 'strictly and narrowly' Program provisions." 26a-27a. He also ruled that Mason manifested his current condition by May of 2001 and that his petition in the Program was untimely filed. 28a. Judgment was entered against Mason on May 4, 2007. 18a. Mason did not move for review of this decision.

On August 9, 2007, Mason applied for attorneys' fees and costs in accordance with § 15(e).[6] 18a. The respondent opposed the application, arguing that the special master had no subject matter jurisdiction to award fees because Mason's petition was untimely. 18a.

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[5] 477 Fed.3d. 1353 (Fed. Cir. 2007).

[6] Section 15(e)(1) provides, *inter alia*, that if the court "does not award compensation, the special master or court may award an amount of reasonable compensation to cover petitioner's reasonable attorneys' fees and other costs . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim. . . ."

The special master agreed, citing Federal Circuit precedent in *Brice v. Sec'y of HHS*, 358 F.3d 865 (Fed. Cir. 2004) ("*Brice II*"). 19a-20a. Mason's application for fees and costs was denied. 20a.

Mason moved for review. 3a; *see also* Petitioner's Memorandum in Support of Motion for Review of the Special Master's Decision of August 31, 2007 ("Pet. Mot. ___."). In so doing, he acknowledged that the Federal Circuit had ruled in *Brice II* that special masters have no subject matter jurisdiction to award attorneys' fees if a petitioner's claim was untimely filed. 6a-7a. Mason argued, however, that *Brice II* was wrong. Indeed, he said, *Brice II* undermined the primary purpose of the Vaccine Act - stopping civil lawsuits against vaccine manufacturers. Instead of preventing contingency fee arrangements and directing potential lawsuits against vaccine manufacturers **into** the Vaccine Program, he argued, *Brice II* effectively diverted such claims **away** from the Vaccine Program and **into** the civil arena. It did so, he explained, by denying potential Vaccine Program petitioners the same legal resources to present questionable "timeliness" claims as are routinely granted to those petitioners who file questionable entitlement claims.

In support of his argument, Mason first argued that congress had expressly granted special masters the authority to hear and decide *all* Vaccine Program proceedings, including untimely filed claims and subsequent applications for attorneys' fees. Pet. Mot. 15.

Thus, Mason pointed out, § 12(a) states:

> [S]pecial masters shall . . . have jurisdiction over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation.

§12(a); *see also* Pet. Mot. 15.

In this regard, Mason argued, while the special master decided he had no jurisdiction to award attorneys' fees and costs, clearly he had the power to take cognizance of Mason's claim, the power to issue a decision that Mason's claim was untimely, and the power to dismiss his petition. 9a. Clearly, acting upon the special master's decision, the Court of Federal Claims had the power to enter judgment against Mason and did so. 9a, 18a. It was equally clear, Mason said, that the special master had the power to take cognizance of his application for fees and costs pursuant to § 15(e). 11a-12a. In fact, the special master had done so and had issued a second written decision on August 31, 2007. *See* 6a-7a. So too, Mason argued, did the Court of Federal Claims have the express jurisdiction to review the special master's decision pursuant to § 12(e). 7a. So too, Mason argued, would the Federal Circuit have the express power to take cognizance of the Court of Federal Claim's decision pursuant to § 12(f). Pet. Mot. 15. In support of his opinion, Mason said, congress had expressly granted special masters, the Court of Federal Claims, and the Federal Circuit, exclusive jurisdiction over all Vaccine Program proceedings from the date a petition was filed until the exhaustion of appeals.

See Pet. Mot 15. This jurisdiction, Mason argued, includes the power to award fees in appropriate untimely filed cases. *See* 8a. All of these grants of jurisdiction, Mason argued, were consistent with congress' intent to promote inclusion in the Vaccine Program - not drive cases away from the Program and into the civil arena.

Next, Mason submitted, a plain reading of the Vaccine Act *clearly* provides for the payment of fees in appropriate cases irrespective of the timeliness of a petition. 14a. In this regard, he said, while untimely filings do deprive petitioners of the benefits of § 15(a), a § 15(e) request for attorneys' fees initiates an entirely separate proceeding. 14a. Indeed, he argued, this statutory provision expressly empowers special masters to take cognizance of and decide these separate proceedings by determining whether a petition was filed in "good faith" and had a "reasonable basis." 11a-12a; *see also* § 15(e)(1)(B).[7]

Next, Mason urged the court to consider several post-*Brice II* Supreme Court decisions that emphasized that time prescriptions, while potentially absolute and not subject to equitable tolling, are **not** "jurisdictional." *See* 13a. In *Kontrick v. Ryan*,[8] for example, the Supreme

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[7] Mason acknowledged that the issue of timeliness may be an important consideration in the special master's determination as to whether the petition was "reasonable" and filed in "good faith." Pet. Mot. 14. The issue is not, however, one of subject matter jurisdiction.

[8] In *Kontrick v. Ryan*, the Supreme Court held that a creditor's failure to meet the 60-day deadline to file an objection to a discharge in bankruptcy did not deprive the court of jurisdiction to consider the merits of the objection. *See* 540 U.S. 443.

Court stated, "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. 443, 455 (2004).

In *Eberhart v. United States*,[9] the Supreme Court firmly termed time limitations as "claim-processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdictional' in our earlier cases (citing *Kontrick*, 540 U.S. at 454)." 546 U.S. 12, 16 (2005); *see also* Pet. Mot. 18. Indeed, *Eberhart* conceded, "Our repetition of the phrase 'mandatory and jurisdictional' has understandably led the lower courts to err on the side of caution by giving [time] limitations . . . the force of subject-matter jurisdiction." 546 U.S. at 19; *see also* Pet. Mot. 18.

In *Arbaugh v. Y & H Corporation*,[10] the Supreme Court again conceded it "ha[d] sometimes been profligate in its use of the term" jurisdiction. 546 U.S. 500, 510 (2006); *see also* Pet. Mot. 19. The Court stated, "For example, this Court and others have occasionally described a nonextendable time limit as 'mandatory and

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[9] In *Eberhart v. United States*, the Supreme Court held that an untimely motion for a new trial after a criminal conviction did not deprive the court of the jurisdiction to consider the merits of the motion. *See* 546 U.S. 12.

[10] *Arbaugh v. Y & H Corporation* involved a Title VII suit for sexual harassment. The Supreme Court held that the statute's 15-or-more employee requirement was not jurisdictional and could be waived by a defendant. *See* 546 U.S. 500.

jurisdictional'. . . . But in recent decisions we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" 546 U.S. at 510; *see also* Pet. Mot. 19. Finally, in *Day v. McDonough*,[11] the Supreme Court pointedly, but simply, stated, "A statute of limitations defense is not jurisdictional. . . ." 547 U.S. 198, 199 (2006); *see also* Pet. Mot. 19.

At Mason's request, his Motion for Review, filed on October 1, 2007, was stayed by Judge Christine O.C. Miller, pending a ruling in *John R. Sand & Gravel Company*. *See* 4a. This case, which involved the "jurisdictional" nature of the statute of limitations of the Tucker Act, 28 U.S.C. § 1491(a)(1), was decided by the Supreme Court on January 8, 2008.[12] In a supplemental brief concerning the impact of

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[11] In *Day v. McDonough*, a district court judge had considered, *sua sponte*, the timeliness of a prisoner's petition for a writ of habeas corpus and dismissed it as untimely. The Supreme Court, noting that a statute of limitations is not jurisdictional, affirmed, holding that a district court is permitted, not obliged, to consider the timeliness issue. *See* 547 U.S. 198.

[12] In *John R. Sand & Gravel Company*, this Court found the Tucker Act's statute of limitations to be jurisdictional. However, Mason submits, the Tucker Act, 28 U.S.C. § 1491(a)(1), is not the Vaccine Act. The Tucker Act provides compensation for damages caused by government mandated environmental remedial action. In these circumstances, the Court's characterization of the Act's statute of limitations as jurisdictional was consistent with congressional intent. The primary purpose of the Vaccine Act, on the other hand, is to stop lawsuits against vaccine manufacturers by resolving them in the Vaccine Program. In these circumstances, to characterize the Vaccine Act's statute as "jurisdictional" defies congressional

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John R. Sand & Gravel Company, Mason argued that the Court's decision helped him in several respects. 10a; *see generally* Petitioner's Supplemental Brief, docketed January 29, 2008 ("Supp. Br. ___."). First, the Supreme Court candidly acknowledged that its historical use of the word "jurisdictional" was confusing and labeled the term "convenient shorthand." 128 S.Ct. at 753. In addition, the Supreme Court explained that the words 'cognizable by' and 'has jurisdiction' "mean about the same thing." *Id.* at 755 (internal cite omitted). Indeed, the term "jurisdiction" simply refers to 'the authority by which courts . . . *take cognizance of* and decide cases. . . .' *Id.* (emphasis in original) (internal cite omitted). In other words, Mason argued, courts have the power to take cognizance of issues of timeliness. 10a. Indeed, Mason said, the Supreme

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intent. At the present time, for example, approximately 5,000 autistic children have filed claims in the Vaccine Program. *See* Pet. Mot. 11. In the event their claims are not resolved in the Vaccine Program, each of them has a right to file a civil tort action against a vaccine manufacturer in state court or in federal district court. *See* § 21; *see also* Pet. Mot. 12. This is precisely what the Vaccine Program attempts to avoid. As the Court is aware, all states toll the running of statutes of limitations in civil actions for minors and mentally handicapped individuals. Thus, any autistic petitioners whose claims are not resolved in the Program will have the right to file civil actions. These include hundreds with "timeliness" issues. To deprive these children of the opportunity to have legal representation to prove their claims were timely filed directly conflicts with a congressional intent that seeks inclusion in the Program, not exclusion from it. Some parents may be able to pay the extensive legal and expert fees involved in these "timeliness hearings," but most will not. They will simply sign contingency fee agreements and file civil actions.

Court's language in *John R. Sand & Gravel Company* harmonizes perfectly with congress' § 12(a) grant of jurisdiction to special masters "over proceedings to determine if a petitioner. . .is entitled to compensation [in] the [Vaccine] Program . . . ." § 12(a); *see also* Supp. Br. 4.

The Court of Federal Claims upheld the decision of the special master. 16a. In so doing, Judge Miller acknowledged as "compelling" the petitioner's arguments that:

> [T]he Vaccine Act expressly provides for the discretionary award of attorneys' fees to a non-prevailing petitioner when a 'petition is brought in good faith' and has 'a reasonable basis'. . . Petitioner highlights that the Vaccine Act's attorneys' fees recovery provision does not specify that the petition be timely filed. Moreover, petitioner argues, disallowing attorneys' fees in cases when the manifestation of symptoms is difficult to pinpoint would undermine the policy — to encourage filings in a process not ossified by technicalities — expressed in the legislative history of the Vaccine Act. Congress stated that the court should make 'adequate provisions for attorneys' time and that the court [should] exercise its discretion to award fees in non-prevailing, good faith claims.' H.R. Rep. No. 99-908 at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6363.

11a-12a.

In Judge Miller's view, however, these "policy considerations . . . cannot overcome the binding precedent that the Vaccine Act is a waiver of sovereign immunity that must be construed strictly." 12a. In her view, "courts are not free to exercise jurisdiction beyond that which Congress expressly authorized in the Vaccine Act." 12a; *Brice I* at 1370.[13]

Mason filed a timely appeal to the United States Court of Appeals for the Federal Circuit.[14] He offered the arguments presented to Judge Miller, arguments not addressed in *Brice II*.[15] He asked the Federal Circuit to re-examine *Brice II* in light of §12 (a)'s express grant of jurisdiction, §15 (e)'s initiation of a separate proceeding, post-*Brice II* Supreme Court decisions addressing the word "jurisdiction," the primary purpose

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[13] Ironically, nine (9) days earlier, the Federal Court of Appeals decided *Zatuchni v. Sec'y of HHS*, 516 Fed.3d 1312 (Fed. Cir. 2008). Commenting on waivers of sovereign immunity and strict construction of such waivers in Vaccine Program cases, the Federal Circuit observed, as had Judge Benjamin Cardozo, "'the exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' . . . quoting *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383. . . ." *Id.*

[14] Although *Brice II* held the Court had no jurisdiction to award fees, it also held it did have "jurisdiction over the Brices' appeal under 28 U.S.C. § 1295(a)(3) and 42 U.S.C. § 300aa-12(e)." *Brice II* at 867.

[15] In *Brice II*, the petitioner argued that the "Rule of Necessity" justified payment of attorneys' fees. *Brice II* at 867. The Federal Circuit, in Mason's view, properly rejected that argument.

of the Vaccine Act, stopping lawsuits, and the consequences of letting *Brice II* stand as precedent.

After oral argument (in San Jose, California), the Court affirmed the judgment of the Court of Federal Claims, invoking Federal Circuit Rule 36. Mason now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The United States Court of Appeals for the Federal Circuit "has decided an important question of federal law that has not been, but should be, decided by this Court. . . ." Supreme Court of the United States, Rule 10 (c). In addition, in Mason's view, the Federal Circuit's ruling "conflicts with relevant rulings of this Court." *Id.*

The issues in this case, Mason submits, are of national importance. In this regard, he says, vaccines are an integral part of the United States' national health and defense systems. In 1988, due to the costs of defending against civil lawsuits, vaccine manufacturers threatened to stop making vaccines. This created a national crisis. To protect existing vaccine supplies, and to encourage the development of new vaccines, congress responded to this crisis by establishing the Vaccine Program ("Program"). As a result, lawsuits against vaccine manufacturers were prohibited unless the Program first had an opportunity to resolve a case. To promote resolution in the Program, congress created an informal, expeditious, generous, "no fault" system with clear advantages over the onerous, lengthy, and

congested civil system. One major incentive to petitioners was the elimination of contingency fee agreements where attorneys would receive substantial percentages of awards. Instead, congress provided, the Program, not the injured person, would pay attorneys' fees for all good faith petitions with reasonable bases for the claims. § 15(e). Since 1988, the Program has worked. Due to the absence of lawsuits, many new vaccines have been developed and are now available. These vaccines have contributed to the nation's health policies.[16] They have strengthened the nation's defense policies. In addition, hundreds of petitioners have received compensation without resorting to civil litigation.

Mason filed a petition in the Vaccine Program. There is no question that Mason's petition was reasonable, that it was filed in good faith, and that it met the requirements of § 15(e). However, after an examination of affidavits, Mason's medical records, and evolving decisions by the Court of Federal Claims and the Federal Circuit, it was ultimately decided that he had missed the Program's three-year filing deadline prescribed by § 16(a).

After his claim was dismissed, Mason presented an application pursuant to § 15(e) for his fees and costs,

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[16] Since the Vaccine Program was established, the following vaccines have been developed and added to the Vaccine Table-hepatitis B vaccine, *haemophilus influenzae* type B vaccine, varicella vaccine, rotavirus vaccine, pneumococcal conjugate vaccines, hepatitis A vaccine, trivalent influenza vaccine, meningococcal vaccine, and human papillomavirus vaccine. *See* § 14.

claiming that his case was reasonable, filed in good faith, and presented new and legitimate factual and legal issues to be resolved by the court. He claimed that petitioners, like him, with questionable timeliness claims, should be encouraged to present claims to the Program by payment of attorneys' fees and costs associated with resolving reasonable, good faith timeliness issues. He claimed that he should be given the same opportunity for access to the Program as those petitioners who filed timely claims, but had questionable proof of vaccine causation. He claimed that a refusal to pay such fees would discourage those with legitimate "timeliness" issues from seeking access to the Program. He claimed that such a refusal was in direct conflict with the primary purpose of the Vaccine Act - to stop civil lawsuits against vaccine manufacturers. He further claimed that *Brice II*, the controlling Federal Circuit decision, had failed to consider congressional intent when ruling that the court lacked subject matter jurisdiction to award fees in good faith, reasonable petitions. He claimed, finally, and most importantly, that hundreds, perhaps thousands, of autistic children with questionable "timeliness" issues, like Mason, would be forced into the civil arena if *Brice II* were allowed to stand. If this happens, he argued, a new crisis would ensue and pose a direct threat to the nation's health and defense systems.

The special master, without addressing congressional intent, ruled he was without subject matter jurisdiction to award fees. The Court of Federal Claims, while appreciating the policy considerations supporting Mason's claim, felt bound by *Brice II*. The Federal Circuit, asked to reconsider *Brice II* in light of

congressional intent, recent Supreme Court decisions, and the consequences of failing to do, simply affirmed without comment.

As a last resort, Mason now petitions this Court for a writ of certiorari. In this regard, as the Court is aware, in traditional tort litigation, plaintiffs must show legal "fault" to recover damages. At present, Mason says, approximately 5,000 autistic children have claims pending in the Program.[17] *See* OAP Autism Update,

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[17] On July 3, 2002, the chief special master issued Autism General Order #1 and created the Program's Omnibus Autism Proceeding ("OAP"). Most autism claims were filed by attorneys who intend to *withdraw* from the Program and file civil actions. In this regard, as the Court is aware, the Vaccine Act requires a person with a vaccine-related injury to file a petition in the Vaccine Program before proceeding in either state or federal court. § 11(a)(2)(A). Indeed, civil plaintiffs with autism who have filed in state and federal courts have been routinely directed to the Vaccine Program in accordance with § 11(a)(2)(B). *See* for example, *Lui v. Aventis Pasteur*, 219 F. Supp.2d 762 (W.D. Tex. 2002); *Owens v. American Home Products Corp.*, 203 F. Supp.2d 748 (S.D. Tex 2002); *McDonald v. Abbott Laboratories*, 2002 WL 32074880 (S.D. Miss. 2002); *Strauss v. American Home Products Corp.*, 208 F. Supp.2d 711 (S.D. Tex. 2002); and *Bertrand v. Aventis Pasteur Laboratories, Inc.*, 226 F. Supp.2d 1206 (D. Ariz. 2002). However, Mason submits, § 21 permits a petitioner to withdraw from the Program if a case is not resolved within certain time periods. In addition, the Vaccine Act permits a petitioner to reject a judgment of the Court of Federal Claims and file a traditional civil action. During the years 2007 and 2008, with the intent of providing guidance to approximately 5,000 autistic petitioners, several "test case" trials were conducted in the Program. *See Cedillo v. Sec'y of HHS*, No. 98-916V; *Hazlehurst v. Sec'y of HHS*, No 03-654V; *Snyder v. Sec'y of HHS*, No. 01-162V; *King v. Sec'y of HHS*, No. 03-584V; and *Dwyer v. Sec'y of HHS*, No. 03-1202V. To date, no decisions have been issued.

September 28, 2007. Most of these children, like Mason, claim mercury in their vaccines caused their brain injuries. Hundreds of these children, like Mason, have timeliness issues. If provided the legal resources to have their timeliness issues resolved by the Program, a substantial number will be permitted to remain in the Program and avoid civil litigation - just as congress intended. If, however, the Program's payment of fees in reasonably-based, good faith filings is contingent upon the ultimate "timeliness" decision, few autistic children will be able to risk incurring the substantial legal fees incurred in resolving complex timeliness issues. In these circumstances, should this Court allow *Brice II* to stand, these autistic children with questionable timeliness claims will be forced to leave the Program and resort to civil litigation - precisely the situation congress sought to prevent. Should these children leave the Program, Mason further submits, they will have a "legal fault" theory to support suits against vaccine manufacturers. In this regard, they can claim it was clear negligence for vaccine manufacturers to use thimerosal (*i.e.* ethyl mercury) as a preservative in vaccines. A new crisis will be inevitable.

Fortunately, Mason says, congress has already devised a statutory scheme to avoid a new crisis. Congress clearly intended to use the Program to stop civil litigation. It gave petitioners substantial incentives to resolve cases in the Program. One such incentive was to give the court the power to pay attorneys' fees for *all* good faith, reasonably-based petitions. In a word, *Brice II* is wrong. It not only fails to consider congressional intent, it uses notions of "waiver of sovereign immunity," "strict construction," and "lack of

subject matter jurisdiction" as weapons to destroy a clearly expressed congressional intent and to undermine important national policies. This Court should grant Mason's petition for a writ of certiorari. To date, the Vaccine Program has protected our national health and defense programs by permitting vaccine manufacturers to continue to make vaccines, and develop new ones, without fear of overwhelming civil litigation. This Court must seize the opportunity to ensure that it continues to do so.

II. LEGISLATIVE HISTORY

The legislative history of the Vaccine Act, Mason submits, provides context to his request for a writ of certiorari.

The Vaccine Program was established for two purposes: (1) to compensate persons injured by vaccines; and (2) to protect the nation's existing vaccine supply and encourage the development of new and safer vaccines. The second goal would be accomplished, congress believed, by reducing the liability risks of vaccine manufacturers. In this regard, it is worth repeating congress' "principal findings" that required the establishment of the Vaccine Program. They are even more important today than they were in 1986. They are:

> 1. [t]he availability and use of vaccines to prevent childhood diseases is among the Nation's top public health priorities;
>
> 2. [t]he Federal government has the responsibility to ensure that all children in

> need of immunization have access to them and to ensure that all children who are injured by vaccines have access to sufficient compensation for their injuries; and
>
> 3. [p]rivate or non-governmental activities have proven inadequate in achieving either of these goals. . . .

H.R. Rep. No. 99-908, 99th Cong., 2d. Sess., page 5 (1986).

Thus, congress stated, "two overriding concerns have led to the development of this legislation:

> (a) the inadequacy—from both the perspective of vaccine-injured persons as well as vaccine manufacturers—of the current approach to compensating those who have been damaged by a vaccine; and
>
> (b) the instability and unpredictability of the childhood vaccine market. . . ."

Id. at 7.

To remedy these concerns, the Vaccine Program was established. Congress hoped the Vaccine Program would lessen the number of lawsuits against manufacturers. In so doing, it hoped the Vaccine Program would promote the "development of both new and improved vaccines. . . . " *Id.* at 4. It also hoped it would help to create, "a new system for compensating individuals who have been injured by vaccines routinely administered." *Id.* at 3. Such awards, congress intended,

"can be made to vaccine-injured persons quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908 at 18; U.S. Code Cong. & Admin. News 1986, page 18.

Congress also intended that the Program, not petitioners, pay attorneys' fees and costs. For this reason, § 15(e)(3) prohibits attorneys from receiving compensation "in addition to" that provided by the Program. However, congress said:

> The Committee does not intend that the limitation of fees to those included in the award act to limit petitioners' ability to obtain qualified assistance and intends that the court make adequate provision for attorneys' time and that the court exercise its discretion to award fees in non-prevailing, good faith claims.

H.R. Rep. No. 99-908 at 22.

Prior to the existence of the Vaccine Program, then, civil lawsuits against vaccine manufacturers abounded. When, due to the crippling costs of litigation, vaccine manufacturers threatened to stop making vaccines, the nation's health programs were also threatened and a crisis ensued. In 1988, congress responded by establishing the Vaccine Program. It was intended to ensure the availability of vaccines and to encourage the development of new ones. In congress' view, this would best be accomplished by prohibiting lawsuits against vaccine manufacturers and by requiring persons claiming vaccine injuries to first present their claims in the Vaccine Program. While congress preserved the

rights of claimants to file civil actions if the Vaccine Program failed to resolve their claims, congress painstakingly designed the Program to minimize this potentiality. It designed a "no fault" program. It designed a generous Program. §§ 15(a)(1-4). It designed a "less adversarial, expeditious, and informal [Program with] . . . flexible and informal standards of [the] admissibility of evidence." §§ 12(d)(2)(A) & (B). While permitting post-Program civil actions, congress made such actions more difficult, by limiting theories of liability (§ 22) and by requiring phased trials. § 23.

Significant to this petition, congress also sought to make the Program attractive by relieving petitioners of the onerous burden of contingent attorney fees and extraordinary case expenses. It did so by providing that the Program, not the petitioner, would pay reasonable attorney fees for petitions filed in good faith with a reasonable basis for the claim. §§ 15(e)(1) & (3).

This petition, however, is not about attorneys' fees. It is about an interpretation of the Court's jurisdiction in a way that promotes, not undermines, congressional intent. It is about minimizing lawsuits against vaccine manufacturers. As Justice Souter noted:

> For injuries and deaths traceable to vaccinations, the Act establishes a scheme of recovery designed to work faster and with greater ease than the civil tort system. H. R. Rep. No. 99-908, pp. 3-7 (1986). Special masters in the Court of Federal Claims hear vaccine-related complaints, 42 U.S.C. § 300aa-12(c) (1988 ed., Supp. V), which they

> adjudicate informally, §300aa-12(d)(2), within strict time limits, §300aa-12(d)(3)(A), subject to similarly expeditious review, §300aa-12(e)(2). **A claimant . . . must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court.** 42 U.S.C. § 300aa-11(a) (1988 ed. and Supp. V).

Shalala v. Whitecotton, 514 U.S. 268, 269-270 (1995) (emphasis added).

III. IMPACT OF *BRICE II* ON CONGRESSIONAL PURPOSE

In Mason's view, *Brice II* is not only wrong but constitutes a threat to significant national health and defense policies.

A. Holding in *Brice II*

In *Brice II*, the Federal Circuit held that only petitioners who properly file claims under § 11 are entitled to apply for attorneys' fees pursuant to § 15(e). *Brice II* at 869. Since untimely petitions are not petitions properly filed under § 11, *Brice II* held, special masters have no subject matter jurisdiction to award fees in such cases. *Id.* The court also observed that the Vaccine Act does not prohibit attorneys from collecting fees directly from families in the event that a claim is "finally dismissed for lack of jurisdiction." *Brice II* at 869.

B. *Brice II* is Contrary to Congressional Purpose

In Mason's view, § 15 (e) is not about ensuring that attorneys get paid. It is about stopping lawsuits by resolving claims in the Program. If parents of autistic children must privately pay attorneys and expert witnesses merely to determine whether their claims were timely filed in the Vaccine Program, few will be capable of doing so. The "entry fee" into the Program will be too high. Instead, as they did prior to the Program's existence, they will sign contingency fee agreements, file civil actions against vaccine manufacturers,[18] and pay up to 40% of any recovery to their attorney. This result is precisely what congress sought to avoid when establishing the Vaccine Program.

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[18] In *Brice I*, the Federal Circuit observed, "[w]e need not decide in this case whether a petitioner who fails to file a timely petition under the Program may still pursue traditional tort remedies." *Brice I* at 1368. The answer to this question, is both relevant and important. Certainly, vaccine manufacturers will argue that untimely filings by autistic children in the Program cut off traditional state tort remedies. Indeed, the number one purpose of the Vaccine Act is to shield vaccine manufacturers from lawsuits. However, Mason points out, all fifty (50) states toll statutes of limitations for minors and for brain-damaged individuals. It is inconceivable that congress would have intended such a sweeping preemption of the rights of children and mentally handicapped persons without a single word in the statute. What does the statute say? The Vaccine Act expressly states that, except as otherwise provided, "State law shall apply to a civil action brought for a vaccine-related injury or death." § 22(a). The Vaccine Act does not provide that untimely petitioners in the Program forfeit all rights to civil litigation. Indeed, such an interpretation is incongruous with congressional intent, will be firmly rejected by state courts, and, hopefully, will be rejected by this Court.

In Mason's view, to promote congressional intent to stop civil lawsuits against vaccine manufacturers, potential petitioners must be given every opportunity to resolve their claims in the Vaccine Program and not be limited to filing civil lawsuits. Payment of attorneys' fees by the Vaccine Program for "timeliness" hearings, win or lose, will encourage use of the Program as a claimant's first option - just as congress intended. Payment of such fees is expressly authorized by § 15(e) for all good faith, reasonably-based petitions.

C. Unintended Consequences of *Brice II*

The failure of the Federal Circuit to overrule *Brice II*, Mason submits, may have unintended, yet dire, consequences. In 2004, when *Brice II* was decided, the issue of whether to award attorneys' fees in untimely filed Vaccine Program cases was one of limited consequence. Only the Brices' attorneys were affected by that decision. Today, however, the stakes are far different. Today, the claims of approximately 5,000 autistic children are pending in the Vaccine Program. Unfortunately, many of these autistic children will need substantial legal proceedings in the Vaccine Program simply to determine whether their petitions were timely filed. This is because, as Judge Futey noted in *Setnes*:

> As distinguished from other medical conditions, however, the beginning stage of autism cannot be reduced to a single, identifiable symptom.... Many of the initial 'symptoms' are subtle and can easily be confused with typical childhood behavior.... Where there is no clear start to the injury, such as in cases involving

> autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on 'the occurrence of the first symptom.'

Setnes, 57 Fed.Cl. at 179.

Due to the "subtle" nature of the initial symptoms of autism, Mason submits, hundreds of "*Markovich* hearings" will be conducted in the Vaccine Program to determine whether a petition was timely filed.[19] In this

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[19] At this time, in an attempt to rid the Vaccine Program of autism cases, the respondent is reviewing hundreds of "pending cases so that determinations concerning the *timeliness of filing* can be made. . . ." *See* OAP Autism Update, September 28, 2007. If the respondent believes an autistic child's petition was untimely filed, a motion to dismiss is made. To date, motions to dismiss for timeliness issues are rampant in the Program. To demonstrate the complexity—and the expense—of resolving these "timeliness" issues, Mason cites *Wilkerson v. Sec'y of HHS*, No. 05-232. In *Wilkerson*, the parties had different interpretations of *Markovich*. If the petitioner's interpretation is correct, Otto Wilkerson, an autistic child, can remain in the Program. If the respondent is correct, Otto's case will be dismissed. To date, extensive medical and legal briefs have been filed. Experts for both parties have reviewed the medical records and each expert has filed a report, limited to the single issue of timeliness. In an attempt to resolve the legal issue without further expense, Otto moved for a ruling on the existing record and the respondent joined his motion. The chief special master eventually issued a decision holding that Otto's claim was untimely. A motion for review is now pending before the United States Court of Federal Claims. Once again, Mason submits, few autistic petitioners can afford to pay the extraordinary attorneys' fees and expert witness fees associated with such protracted proceedings.

regard, Mason says, according to *Brice II*, and the Federal Circuit's decision in this case, payment by the Program of a petitioner's attorneys' fees (and expert witness costs) in each case is contingent upon a special master's ruling that the claim was timely filed. In these circumstances, few petitioners will have the ability to finance (or take the risk of financing) these hearings. Indeed, few parents of autistic children have the means to provide medical treatment for their autistic children, let alone the extensive attorneys' fees and expert witness fees involved in Vaccine Program proceedings. Instead, they will be required to proceed *pro se*, "opt out" of the Program (§ 21), or sign contingency fee agreements and sue manufacturers. This is precisely what congress attempted to prevent.

In *Brice I*, the majority ruled that equitable tolling of statutes of limitations is not available in the Vaccine Program. In her dissent, however, Judge Newman emphasized "the judicial obligation . . . to examine 'whether congressional purpose is effectuated. . . .'" (citing *Burnett v. New York Central Railroad Co.* 380 U.S. 424 (1965)). *Brice I* at 1375. In Judge Newman's view, the majority failed to discharge this obligation. In *Brice II*, Mason submits, the "congressional purpose" of the Vaccine Act was not the court's primary consideration. Instead, the issue was payment of attorneys' fees.

If *Brice II* is permitted to stand, hundreds, perhaps thousands, of cases will be diverted away from the Vaccine Program. These "former" petitioners will file lawsuits against vaccine manufacturers in all fifty (50) states. In Mason's view, such an occurrence not only

would be inconsistent with the ***primary*** purpose of the Program - to stop lawsuits against vaccine manufacturers - but also would cause a health disaster. Indeed, Mason submits, it would dwarf the "crisis of 1986" that spawned the Vaccine Program.[20] In addition, Mason submits, the events of September 11, 2001 have spawned a new national policy. "Homeland Security" now demands the development of new vaccines, such as anthrax and smallpox vaccines,[21] to assist the public in combating terrorist threats. While compensation for injuries due to these vaccines are not covered by the Vaccine Program, civil lawsuits by persons injured by covered vaccines would also affect the manufacturers' ability to continue to manufacture and develop anti-terror vaccines.

IV. POST-*BRICE II* DECISIONS

Post-*Brice II* decisions, Mason submits, apply rational approaches to interpreting issues of subject matter jurisdiction, ones that promote - not defeat - clearly expressed congressional intent. It is important, Mason submits, that courts apply reason when interpreting the Vaccine Act. In *Brice I* and *Brice II*, the Federal Circuit ruled that the Vaccine Act is a waiver of sovereign immunity to be strictly construed and that courts have no subject matter jurisdiction to award fees in untimely filed Program cases. Several decisions

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[20] Schurr, Stephen., *On Wall Street: A time bomb ticks under Big Pharma*, THE FINANCIAL TIMES (London), March 26, 2005.

[21] See, for example, the UNITED STATES DEPARTMENT OF DEFENSE web site at www.vaccines.army.mil/, for continuing defense-related vaccine issues.

issued by the Federal Circuit and by this Court subsequent to *Brice II*, however, indicate that "waivers of sovereign immunity" and "jurisdiction" are slippery concepts. In the end, however, they are simply two of many tools used by courts to interpret federal statutes. The primary tools to be used, however, are the plain language of the statute and the congressional purpose of the statute.

In *Venture Coal Sales Co. v. U.S.*, a case decided just three months after *Brice II* by a different panel, the Federal Circuit ruled that a plaintiff's failure to timely file a claim does not affect the subject matter jurisdiction of the Court of Federal Claims. 370 F.3d 1102, 1105, n.2 (Fed. Cir. 2004). Next, in *Kirkendall v. Dept. of the Army*, the Federal Circuit ruled that "the Supreme Court has 'clarified that time prescriptions, however emphatic, are not properly jurisdictional.'" 479 F.3d 830, 842 (Fed. Cir. 2007). Dissenting, Judge Dyk, who wrote the *Brice I* opinion, recognized that recent "Supreme Court[] cases have admittedly clouded the 'jurisdictional' nature" of time bars. *Id.* at 872.

In *Kontrick v. Ryan*, this Court stated, "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. 443, 455 (2004). Once again, in *Eberhart v. U.S.*, this Court termed time limitations as "claim-processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdiction' in our earlier cases (citing *Kontrick*, 540

U.S. at 454)." 546 U.S. 12, 16 (2005). In *Eberhart*, this Court stated:

> Although we find [the Court of Appeals] disposition to have been in error, we fully appreciate that it is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases. Our repetition of the phrase 'mandatory and jurisdictional' has understandably led the lower courts to err on the side of caution by giving [time] limitations . . . the force of subject-matter jurisdiction.

Id. at 19.

Next, in *Arbaugh v. Y & H Corporation*, this Court conceded, once again, that it "ha[d] sometimes been profligate in its use of the term" jurisdiction. 546 U.S. 500, 510 (2006). The Court stated, "[I]n recent decisions we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Id.* Further, "[w]e have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Id.* at 511. Then, in *Day v. McDonough*, this Court bluntly stated, "A statute of limitations defense is ***not*** jurisdictional. . . ." 547 U.S. 198, 199 (2006) (emphasis added).

The Federal Circuit's decision in *John R. Sand & Gravel Company v. U.S.*,[22] demonstrated a clear difference of opinion among Federal Circuit judges with respect to subject matter jurisdiction and untimely filings. The sole issue reviewed by the Federal Circuit was whether failure to meet the six-year statute of limitations in the Tucker Act deprived the Court of Federal Claims of subject matter jurisdiction. The majority opinion recognized that recent Supreme Court decisions have described time limitations as non-jurisdictional claim processing rules. 457 F.3d at 1354. However, the court insisted, a plaintiff's failure to meet the time limitation of 28 U.S.C. § 2501, is jurisdictional and did deprive the Court of Federal Claims of jurisdiction to enforce the claim. *Id.* at 1346. In her dissent, Judge Newman cited a litany of decisions, many cited herein, that explicitly state that the Court of Federal Claims' subject matter jurisdiction is *not* affected by statutory bars to remedies, such as time limits.[23] *Id.* at 1362.

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[22] 457 F.3d 1345 (Fed. Cir. 2006).

[23] Judge Newman cited, *inter alia*:

> *Ariadne Fin. Servs. Pty. Ltd. v. U.S.*, 133 F.3d 874, 878 (Fed. Cir. 1998), ('the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims'); *Henke v. U.S.*, 60 F.3d 795,798 n.3 (Fed. Cir. 1995) ('The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter

(Cont'd)

This Court agreed with the majority of the Federal Circuit. It found the Tucker Act's statute of limitations to be jurisdictional. However, Mason again emphasizes, the Tucker Act, 28 U.S.C. § 1491(a)(1), is not the Vaccine Act. The Tucker Act provides compensation for damages caused by government mandated environmental remedial action. The Supreme Court's characterization of the Act's statute of limitations as jurisdictional was *consistent* with congressional intent. Nothing in the *John R. Sand & Gravel Company* ruling undermines the congressional purpose of the Tucker Act. The primary purpose of the Vaccine Act, on the other hand, is to stop lawsuits against vaccine manufacturers by resolving them in the Vaccine Program. In these circumstances, Mason submits, depriving the court of the power to implement provisions specifically designed by congress to promote this goal, provisions such as § 15(e), defies congressional intent. This Court cannot permit this to happen.

Indeed, Mason says, this Court has recently confirmed this common sense approach. Thus, the Supreme Court stated:

> The sovereign immunity canon is just that — a canon of construction. It is a tool for

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(Cont'd)

> jurisdiction over the claim'); [and] *Borough of Alpine v. U.S.*, 923 F.2d 170, 171 n.1 (Fed. Cir. 1991) (despite an untimely filing the 'Claims Court has and will continue to have jurisdiction over the subject matter of Contract Disputes Act cases').

457 F.3d 1363.

> interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.

Richlin Security Service Company v. Michael Chertoff, Sec'y of Homeland Security, 128 S.Ct. 2007, 2019 (2008).

In Mason's case, the doctrine of sovereign immunity should play no role. The plain language of § 15(e) of the Vaccine Act and the congressional purpose of the statute remove all ambiguity. The court, Mason submits, has jurisdiction to award fees in this case and should do so.

V. MASON'S PETITION HAD A REASONABLE BASIS AND WAS FILED IN GOOD FAITH

In petitioning this Court for a writ of certiorari, Mason says, there is no question that his claim, although untimely, had a reasonable basis and was filed in good faith. In this regard, neither the respondent nor the special master questioned that Mason's petition was filed in good faith. Neither questioned that the requested fees and costs were reasonable. He would not have requested a writ if good faith or reasonableness were in question.

VI. CONGRESS EXPRESSLY GAVE SPECIAL MASTERS JURISDICTION TO AWARD PETITIONER'S ATTORNEYS' FEES AND COSTS IN UNTIMELY FILED CASES AND CONGRESS ENCOURAGED THE AVAILABILITY OF COMPETENT COUNSEL

The Vaccine Act, Mason submits, *expressly* confers special masters with jurisdiction over all aspect of proceedings in the Vaccine Program, including the authority to award fees and costs in untimely filed cases. Thus, § 12(a) states:

> The United States Court of Federal Claims and . . . special masters shall . . . have **jurisdiction** over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation.

§ 12(a) (emphasis added).

While the special master said he has no jurisdiction to award Mason attorneys' fees and costs, clearly he had jurisdiction to determine that Mason's claim was untimely. So too, pursuant to § 12(e), did the Court of Federal Claims have the jurisdiction to review the special master's decision. So too, pursuant to § 12(f), did the Federal Circuit have power to review the Court of Federal Claims decision. So too, does this Court have the jurisdiction to review the decision of the Federal Circuit.

Next, Mason submits, congress also intended that petitioners be provided, at no cost, competent counsel to litigate their claims, including good faith, reasonable issues involving whether or not a petition was timely filed. In this regard, once again, in the Vaccine Program contingency fees are impermissible. *See Beck by Beck v. Sec'y of HHS*, 924 F.2d 1029 (Fed. Cir. 1991). Instead, the Vaccine Act specifically provides that the Vaccine Program, not the vaccine-injured petitioner, is responsible for the petitioner's attorneys' fees. *See* § 15(e)(1). Indeed, a petitioner's counsel is specifically prohibited from charging "any fee for service[]" that is "in addition to" any amount awarded by the Vaccine Program. *See* § 15(e)(3). Congress also intended that the Vaccine Program provide competent counsel to represent petitioners. In this regard, the Federal Circuit has said, "A . . . purpose of the [Vaccine] Act is to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act." *Saunders v. Sec'y of HHS*, 25 F.3d 1031, 1035 (Fed. Cir. 1994).[24] In Mason's case, he deserved competent counsel, at no cost to him, to litigate the complex issue of whether his claim was timely filed.

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[24] Indeed, as this Court is aware, Vaccine Program cases are intensely litigated by the parties. What is expected of a petitioner's attorney? As the Court of Federal Claims has said:

> We reject unequivocally any suggestion that an attorney for a petitioner under the vaccine program is warranted in putting out anything less than the highest effort [on behalf of his or her client]. . . .[A]n attorney for a petitioner under the vaccine program must prepare his case as if every factual and legal issue will be contested, regardless of how straightforward or uncontested the case may appear with hindsight. Any other approach would not serve the client's interests.

Holton v. Sec'y of HHS, 24 Cl.Ct. 391, 398 (USCFC 1991).

CONCLUSION

This Court has an opportunity to promote, not undermine, the primary purpose of the Vaccine Act - preventing civil lawsuits against vaccine manufacturers. This Court has the opportunity to help avoid - not create - a new health crisis. This Court has the opportunity to strengthen, not weaken, important national health and defense policies. It can do so by ruling that special masters, pursuant to § 21(a), have subject matter jurisdiction over all Vaccine Program proceedings, including the power to award fees in reasonably-based, good faith filings - even ones that ultimately prove to be untimely.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED NOVEMBER 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5068

LEE ANN KAY, parent of Mason Kay, a minor,

Petitioners-Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 05-VV-393

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (LOURIE, RADER, and PROST, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED NOV 10 2008

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED FEBRUARY 21, 2008

UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-393V

LEE ANN KAY, Parent of MASON KAY, a Minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

February 21, 2008, Filed

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This matter is before the court following briefing on Petitioner's Motion for Review of the Special Master's Decision of August 31, 2007 and Petitioner's Motion for an Interlocutory Order Pursuant to 28 U.S.C. § 1292(d)(2)[1] filed on October 1, 2007, following

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1. Petitioner's motion for an interlocutory order is premature. Petitioner first must obtain a ruling on her motion for review of the special master's decision to the United States Court of Federal Claims, pursuant to 42 U.S.C. § 300aa-12(e)(1) (2000). The motion is denied as moot. The decision issued this date directs a final judgment from which appeal may be taken.

petitioner's unsuccessful compensation claim and application for attorneys' fees and costs pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10 to-34 (2000) (the "Vaccine Act"). The issue on review is whether jurisdiction resided in the special master to consider an award of attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e), once he had determined that the compensation claim brought by petitioner was untimely.[2] The court treats this motion as a variant of a request that the court review the ruling rejecting jurisdiction over petitioner's application for attorneys' fees and costs incurred in connection with a time-barred petition for compensation under the Vaccine Act. On November 16, 2007, pursuant to the parties' agreement, the court ordered a stay of proceedings pending the United States Supreme Court's decision in *John R. Sand & Gravel Co. v. United States*, __ U.S. __, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008), a ruling that resolved any purported inconsistencies in decisions concerning whether filing within the statute of limitations applicable to the United States Court of

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2. 42 U.S.C. § 300aa-15(e)(1), provides, in pertinent part:

> If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

Appendix B

Federal Claims in an action brought pursuant to 28 U.S.C. § 1491(a)(1) (2000) (the "Tucker Act"), *see* 28 U.S.C. § 2501 (2000), is a prerequisite to the court's exercise of subject matter jurisdiction. Supplemental briefing, ordered at petitioner's request, concluded on February 1, 2008. Argument is deemed unnecessary.

FACTS AND BACKGROUND

The facts pertinent to jurisdiction are not disputed.[3] On March 23, 2005, Lee Ann Kay ("petitioner"), on behalf of her minor son Mason Kay, filed a petition pursuant to the Vaccine Act, alleging that Mason suffered from speech delay and learning disabilities as a result of the administration of thimerosal containing vaccines. The record on review indicates that Mason received a Hepatitis B vaccine on April 22, 1999; Hepatitis B vaccine, diphtheria-tetanusacellular pertussis (DTaP) vaccine, hemophilus influenza type-b (Hib) vaccine, and inactive polio vaccine (IPV) on June 30, 1999; DTaP vaccine, Hib vaccine and IPV on August 11, 1999; Hepatitis B vaccine, DTaP vaccine, and Hib vaccine on September 27, 1999; Hib vaccine, measles-mumps-rubella (MMR) vaccine and varicella vaccine (Varivax) on April 3, 2000; and DTaP vaccine and IPV

3. The facts set forth in this section, together with any included in the discussion section, represent the court's review of all facts. *See Monsanto Co. v. Bayer Bioscience N.V.*, 514 F.3d 1229, 1239 n. 13 (Fed.Cir.2008) (questioning whether factual findings must be restated in trial court opinion's legal discussion).

on October 10, 2000. *Kay v. Sec'y of HHS*, No. 05-393V, slip op. at 4 (Fed.Cl.Off.Spec.Mstr. Mar. 26, 2007) (unpubl.) ("*Kay Compensation Decision*").

On March 26, 2007, Special Master John F. Edwards issued his compensation decision on petitioner's claim. *Id.* slip op. at 4. The special master found that during May 2001 an early-intervention specialist and a speech-language pathologist identified that Mason exhibited "[a] severe auditory comprehension deficit, a severe expressive communication deficit, significant concerns with social skills including eye contact, attention span, cooperation and interaction, significant concerns with sensory integration skills, and significant concerns with play skills." *Id.* slip op. at 2, 4 (internal quotations omitted). Based on this evidence, the special master dismissed petitioner's claim for lack of jurisdiction because the manifestation of the condition occurred more than thirty-six months before the filing of the petition on March 23, 2005. *Id.* slip op. at 4 (citing 42 U.S.C. § 300aa-16(a)(2) (prescribing that no petition may be filed for compensation under Vaccine Act "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset")).

Subsequently, on August 9, 2007, petitioner filed her application for attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e). The special master rejected the application on August 31, 2007, determining, under *Brice v. Sec'y of HHS*, 358 F.3d 865, 868 (Fed.Cir.2004) ("*Brice II*"), "that a special master may not exercise

discretion under § 300aa-15(e)(1) to award attorney's fees, attorney's costs and personal expenses to an unsuccessful petitioner when the unsuccessful petitioner filed a Program petition beyond the statute of limitations contained in § 300aa-16(a)(2)." *See Kay v. Sec'y of HHS*, No. 05-393V, slip op. at 2 (Fed.Cl.Off.Spec.Mstr. Aug. 31, 2007) (unpubl.) (" *Kay Attorneys' Fees Decision*").[4]

DISCUSSION

Pursuant to 42 U.S.C. § 300aa-12(e)(1) and RCFC App. B, Rule 23, petitioner's motion seeks review of the special master's decision rejecting the application for attorneys' fees and costs.[5] She cites as legal error the special master's determination that, because the underlying claim was time-barred, subject matter

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4. *Brice II* stated: "The jurisdiction of the Court of Federal Claims to award attorneys' fees under the Vaccine Act is not unlimited. The court must have jurisdiction over a petitioner's claim for compensation before it can award attorneys' fees." *Brice II*, 358 F.3d at 868 (citing *Martin v. Sec'y of HHS*, 62 F.3d 1403, 1405 (Fed.Cir.1995)) ("[S]ection 300aa-15(e)(1) simply authorizes fee awards *in cases already within the jurisdiction of the Court of Federal Claims.*" (emphasis added)).

5. 42 U.S.C. § 300aa-12(e)(1) provides: "Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision." RCFC App. B, Rule 23 similarly mandates: "To obtain review of a special master's decision, within 30 days after the date on which the decision is filed, a party must file with the clerk a motion for review of the decision."

jurisdiction is lacking over the ancillary claim for attorneys' fees. Petitioner argues that the statute of limitations is not jurisdictional, insofar as dismissal of a case as untimely does not affect the Vaccine Act's grant of subject matter jurisdiction to determine an award of attorneys' fees. Although binding precedent from the United States Court of Appeals for the Federal Circuit mandates that the statute of limitations in the Vaccine Act is jurisdictional, *see Brice II*, 358 F.3d at 868; *supra* note 4, this case was stayed pending the Supreme Court's reexamination in *John R. Sand & Gravel* of whether the subject matter jurisdiction of the Court of Federal Claims is circumscribed by statutes of limitations.

1. ***Standard of review***

The Vaccine Act specifies three alternative courses of action available to the Court of Federal Claims in reviewing a special master's decision. The court may

> (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
>
> (B) set aside any findings of fact or conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or

> (C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2).[6]

Petitioner asserts legal error in the special master's decision that he lacks jurisdiction to award attorneys' fees. Legal conclusions of the special master are reviewed de novo. *See Capizzano v. Sec'y of HHS*, 440 F.3d 1317, 1323-24 (Fed.Cir.2006). "Issues of . . . jurisdiction under the Vaccine Act are questions of law, which [are] review[ed] de novo." *Aull v. Sec'y of HHS*, 462 F.3d 1338, 1342 (Fed.Cir.2006).

2. *Applicability of John R. Sand & Gravel*

In contending that the Vaccine Act's statute of limitations is not jurisdictional, *see* Petr.'s Br. filed Oct. 1, 2007, at 15; Petr.'s Br. filed Jan. 29, 2008, at 2 ("While the special master says he has no jurisdiction to award attorneys' fees and costs, clearly he had jurisdiction to determine that [petitioner's] claim was untimely. So too, pursuant to § 12(e), the Court of Federal Claims has the jurisdiction to review this decision."), petitioner advances the same argument ultimately rejected in *John R. Sand & Gravel.* The Supreme Court explained in *John R. Sand & Gravel* that, because the Tucker Act waives sovereign immunity and grants the Court of Federal Claims jurisdiction to hear cases against the

6. The language of 42 U.S.C. § 300aa-12(e)(2) is identical in substance to RCFC App. B, Rule 27.

United States Government, the jurisdictional grant applies only with respect to those cases explicitly within the scope of the statute. *See John R. Sand & Gravel*, 128 S.Ct. at 753-54. As a result, any case brought pursuant to the Tucker Act that was not filed within the statute of limitations prescribed by Congress must be dismissed for want of jurisdiction. *Id.* The Supreme Court's decision in *John R. Sand & Gravel* reinforces the conclusion reached by the Federal Circuit as to the scope of the Vaccine Act in *Brice II*-that the statute of limitations set forth in a congressional waiver of sovereign immunity establishes a limitation on the Court of Federal Claims' exercise of jurisdiction. *See id.* at 755. Because the Vaccine Act represents the same conditional waiver of sovereign immunity as the Tucker Act in *John R. Sand & Gravel*, the holding applies with equal force to the case at bar.

In her supplemental brief filed after the issuance of *John R. Sand & Gravel*, petitioner reads *John R. Sand & Gravel* as reinforcing the proposition that special masters "have the power to take cognizance of issues of timeliness." Petr.'s Br. filed Jan. 29, 2008, at 3-4. While this proposition is accurate, it does not vouchsafe that the special master has authority to render a decision over the substance of the claim. Rather, the special master has the power to assess facts pertaining to timeliness in order to determine whether he has jurisdiction over the substance of petitioner's claim. If the special master determines that a claim under the Vaccine Act is not timely, he dismisses the case for want of jurisdiction. This should be contrasted with a

determination of entitlement (or lack of entitlement) to compensation under the Vaccine Act. Thus, when the special master determines that a claim is untimely and provisionally dismisses a petition for lack of jurisdiction, the special master has determined only that the Vaccine Act does not authorize him to consider the merits of the petition.

3. *Applicability of Brice II*

Petitioner concedes that the decision rendered in *Brice II*-holding that a court must have subject matter jurisdiction over a petitioner's claim for compensation before it can award attorneys' fees-would require dismissal of her application for lack of jurisdiction. Petr.'s Br. filed Oct. 1, 2007, at 1 ("[Petitioner] concedes, the Federal Circuit, in *Brice v. Sec'y of HHS*, 358 F.3d 865 (Fed.Cir.2004), held that a special master has no jurisdiction to award attorney fees pursuant to 42 U.S.C. § 300aa-15(e) if the court determines that a petitioner's claim was untimely filed pursuant to § 16(a)(2)."). Nonetheless, she reasons that *Brice II* misinterpreted the Vaccine Act, and that it is no longer binding authority after subsequent decisions of the Federal Circuit and Supreme Court have questioned whether statutes of limitations operate as jurisdictional bars. *Id.* at 12.

Petitioner points out that the Vaccine Act expressly provides for the discretionary award of attorneys' fees to a non-prevailing petitioner when a petition is "brought in good faith" and has a "reasonable basis."

42 U.S.C. § 300aa-15(e)(1). Petitioner highlights that the Vaccine Act's attorneys' fees recovery provision does not specify that the petition be timely filed. Moreover, petitioner argues, disallowing attorneys' fees in cases when the manifestation of the symptoms is difficult to pinpoint would undermine the policy-to encourage filings in a process not ossified by technicalities-expressed in the legislative history of the Vaccine Act. Congress stated that the court should make "adequate provision for attorneys' time and that the court [should] exercise its discretion to award fees in non-prevailing, good-faith claims." H.R.Rep. No. 99-908 at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6363.

While the policy considerations emphasized by petitioner are compelling, they cannot overcome the binding precedent that the Vaccine Act is a waiver of sovereign immunity that must be construed strictly; courts are not free to exercise jurisdiction beyond that which Congress expressly authorized in the Vaccine Act. *See Brice v. Sec'y of HHS*, 240 F.3d 1367, 1370 (Fed.Cir.2001) ("*Brice I*") (holding that, with regard to Vaccine Act, "a statute of limitations is a condition on the waiver of sovereign immunity by the United States, and courts should be 'careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended' " (alteration in original) (quoting *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed.Cir.2000))); *see also John R. Sand & Gravel*, 128 S.Ct. at 753-55 (holding that plaintiff's filing of claim within statute of limitations of Tucker Act, as congressional waiver of sovereign immunity, is

prerequisite to court's exercise of jurisdiction). Thus, in order to recover attorneys' fees and costs, petitioner must assert a claim within the express provisions of the Vaccine Act by filing her petition within the statutory time period that Congress established.

Despite the validation of holdings like *Brice I* by the Supreme Court, petitioner represents that several later Federal Circuit and Supreme Court cases have called into question the holding of *Brice II*. Petr.'s Br. filed Oct. 1, 2007, at 15-16; Petr.'s Br. filed Jan. 29, 2008, at 3-5. The cases cited by petitioner, *see* Petr.'s Br. filed Oct. 1, 2007, at 16-19 and Petr.'s Br. filed Jan. 29, 2008, at 3-5 (citing *Day v. McDonough*, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Eberhart v. United States*, 546 U.S. 12, 15, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004); *Kirkendall v. Dep't of Army*, 479 F.3d 830, 842 (Fed.Cir.2007); *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n. 2 (Fed.Cir.2004)), illustrate the recent controversy regarding the nature of a statute of limitations as a jurisdictional limitation that the Supreme Court resolved to address in granting certiorari in *John R. Sand & Gravel*, __ U.S. __, 127 S.Ct. 2877, 167 L.Ed.2d 1151 (2007) (mem.). To the extent that the cases petitioner cited indicate that the issue of timeliness is not properly a question of the court's jurisdiction in an action brought pursuant to a waiver of sovereign immunity, they unquestionably have been overruled by the Supreme Court's holding in *John R.*

Sand & Gravel. See Discussion *supra* part 2. The remaining cases deal with statutes of limitations not found within a congressional waiver of sovereign immunity and thus present a different question than that presented in the case at bar.

Although her petition was filed under the Vaccine Act, not the Tucker Act, the same rationale reaffirmed by the Supreme Court in *John R. Sand and Gravel-* and echoed by the Federal Circuit in *Brice II*, binding precedent upon the court-applies with equal force to the Vaccine Act. The Vaccine Act provides an alternative source of relief for claimants injured by childhood vaccines. It waives the Government's sovereign immunity and confers jurisdiction on the Court of Federal Claims to award relief to injured parties. Just as the Tucker Act operates as a waiver of sovereign immunity establishing jurisdiction over cases filed within the time period prescribed, so, too, the Vaccine Act operates as a waiver of sovereign immunity allowing jurisdiction only over cases filed within its expressed thirty-six month statute of limitations.

4. *Applicability of Vaccine Act's statute of limitations to application for attorneys' fees*

Petitioner contends that the Vaccine Act's statute of limitations only applies to the underlying claim for compensation, not to the application for attorneys' fees, which is itself "an entirely separate proceeding, one governed by entirely different statutory conditions." *See* Petr.'s Br. filed Jan. 29, 2008, at 3; *see also* Petr.'s

Br. filed Oct. 1, 2007, at 14-15. Thus, according to petitioner, her application for attorneys' fees is sufficient jurisdictionally because the Vaccine Act does not condition recovery of attorneys' fees on a requirement that the underlying compensation*606 petition be timely filed. *Id.*[7] The language of the statute defeats this aspirational argument:

> [I]f a vaccine-related injury occurred as a result of the administration of such vaccine, *no petition may be filed for compensation under the Program* for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

42 U.S.C. § 300aa-16(a)(2) (emphasis added). Section 300aa-15(e) of the Vaccine Act contemplates that a substantive decision denying an award of compensation does not disqualify a petitioner from recovering attorneys' fees in prosecuting the unsuccessful petition; but, if the special master cannot make a decision whether to award compensation because he lacks jurisdiction to do so, the fee recovery provision is inoperable. *Martin v. Sec'y of HHS*, 62 F.3d 1403, 1405-06 (Fed.Cir.1995) (noting that section 300aa-15(e)(1) provides for

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7. Petitioner does acknowledge that the issue of timeliness may be an important consideration in the special master's determination as to whether the petition was "reasonable" and filed in "good faith." Petr.'s Br. filed Jan. 29, 2008, at 3 n. 2.

discretionary award of attorneys' fees to an unsuccessful petitioner only upon judgment on petition for compensation pursuant to section 300aa-11). Congress' restriction of the waiver of sovereign immunity in the Vaccine Act to those claims brought within thirty-six months of the onset of symptoms disqualifies petitioner from recovering attorneys' fees incurred in prosecuting a petition initiated beyond that time limitation. In the case at bar, the special master had no jurisdiction to consider the petition and therefore could not award attorneys' fees and costs.

CONCLUSION

Accordingly, based upon the foregoing,

IT IS ORDERED, as follows:

1. The decision of the special master is upheld, and the Clerk of the Court shall enter an order dismissing the application for attorneys' fees and costs for lack of subject matter jurisdiction.

2. Petitioner's motion for an interlocutory order is denied as moot.

No costs on review.

s/ Christine O.C. Miller
Christine O'Dell Cook Miller
Judge

APPENDIX C — DECISION OF THE UNITED STATES COURT OF FEDERAL CLAIM DATED AUGUST 31, 2007

UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-0393V

LEE ANN KAY, as parent of her son, MASON KAY,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

Aug. 31, 2007.

DECISION ON ATTORNEYS' FEES, ATTORNEYS' COSTS AND PERSONAL EXPENSES[1]

JOHN F. EDWARDS, Special Master.

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1. As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

Appendix C

Petitioner, Lee Ann Kay (Ms. Kay), as parent of her son, Mason Kay (Mason), seeks an award of $24,188.71 in attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9 for an action that she pursued under the National Vaccine Injury Compensation Program (Program).[2] *See* Petitioner's Application for Fees and Costs (Fee Petition), filed August 9, 2007. Ms. Kay did not receive Program compensation. Indeed, on March 26, 2007, the special master ruled that the statute of limitations contained in § 300aa16(a)(2) bars Ms. Kay's Program petition. *See Kay v. Secretary of HHS*, No. 05-0393V, Decision (Fed.Cl.Spec.Mstr. Mar. 26, 2007). Ms. Kay did not seek review of the special master's decision. Therefore, on May 4, 2007, the clerk of court entered judgment dismissing the petition. *See Kay v. Secretary of HHS*, No. 05-0393V, Judgment (Fed.Cl. May 4, 2007).

Respondent objects to Ms. Kay's Fee Petition. *See generally* Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs (Response), filed August 16, 2007. Citing *Brice v. Secretary of HHS*, 358 F.3d 865 (Fed.Cir.2004), and *Martin v. Secretary of HHS*, 62 F.3d 1403 (Fed.Cir.1995), respondent contends that the special master "lacks jurisdiction to award attorneys' fees and costs." Response at 1, 5. Thus, respondent insists, the special master "must" deny Ms. Kay's Fee Petition. Response at 1.

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2. The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Ms. Kay did not reply to respondent's Response. *See* Vaccine Rule 8(f) ("Any fact or argument not raised specifically in the record before the special master shall be considered waived and cannot be raised by either party in proceedings on review of a special master's decision.")

Brice stands certainly for the proposition that a special master may not exercise discretion under § 300aa-15(e)(1) to award attorney's fees, attorney's costs and personal expenses to an unsuccessful petitioner when the unsuccessful petitioner filed a Program petition beyond the statute of limitations contained in § 300aa-16(a)(2). *Brice*—and *Martin*—represent precedent of the United States Court of Appeals for the Federal Circuit (Federal Circuit). The special master and the United States Court of Federal Claims "may not deviate from" Federal Circuit precedent, *Crowley v. U.S.*, 398 F.3d 1329, 1335 (Fed.Cir.2005), unless "the circuit's precedent is expressly overruled by statute or by a subsequent Supreme Court decision." *Strickland v. Secretary of HHS*, 423 F.3d 1335, 1338, n. 3 (Fed.Cir.2005), citing *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed.Cir.2000). Congress has not abrogated *Brice* by amending the statute establishing the Program. The United States Supreme Court has not overruled *Brice*. In fact, the United States Supreme Court denied a petition for writ of certiorari in *Brice*. *Bryce v. Secretary of HHS*, 534 U.S. 1040 (2001). As a consequence, *Brice* compels the special master to deny Ms. Kay's Fee Petition.

Appendix C

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment denying the Fee Petition.

APPENDIX D — DECISION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED MARCH 26, 2007

UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-0393V

LEE ANN KAY, as parent of her son, MASON KAY,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

March 26, 2007.

DECISION

JOHN F. EDWARDS, Special Master.

Petitioner, Lee Ann Kay (Ms. Kay), as parent of her son, Mason Kay (Mason), seeks compensation under the National Vaccine Injury Compensation Program (Program).[1] Ms. Kay filed a Program petition on March 23, 2005. She alleges that "Mason suffered speech delay

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1. The statutory provisions governing the Vaccine Program ram are found in 42 U.S.C. §§ 300aa-10 et seq. For convenience, further reference will be to the relevant section of 42 U.S.C.

and learning disabilities" following "the administration of thimerosal[-]containing vaccines on April 7, 1999." Petition (Pet.) at 1.

BACKGROUND

Mason was born on April 7, 1999, in Flensburg, Germany. Petitioner's exhibit (Pet.ex.) 8 at 3. As an infant, Mason received periodic pediatric medical care from physicians in the pediatric clinic at the United States Army Hospital in Heidelberg, Germany. *See generally* Pet. ex. 2. The physicians administered a full complement of routine childhood vaccines to Mason, including Hepatitis B vaccine on April 22, 1999, Pet. ex. 2 at 10; Hepatitis B vaccine, diphtheria-tetanusacellular pertussis (DTaP) vaccine, hemophilus influenza type-b (Hib) vaccine, and inactive polio vaccine (IPV) on June 30, 1999, Pet. ex. 2 at 11; DTaP vaccine, Hib vaccine and IPV on August 11, 1999, Pet. ex. 2 at 12; Hepatitis B vaccine, DTaP vaccine, and Hib vaccine on September 27, 1999, Pet. ex. 2 at 13; Hib vaccine, measles-mumps-rubella (MMR) vaccine and varicella vaccine (Varivax) on April 3, 2000, Pet. ex. 2 at 15; and DTaP vaccine and IPV on October 10, 2000. Pet. ex. 2 at 16.

According to Ms. Kay, "Mason's motor skills were mildly delayed." Pet. ex. 4 at 23. Indeed, although Mason exhibited "good tone" on August 11, 1999, he was "not rolling over yet." Pet. ex. 2 at 12. And, a physician noted "[decreased] head control" that the physician attributed to "[decreased] tummy/prone time." *Id.* The physician determined to monitor Mason's "tone/head control." *Id.*

By September 27, 1999, Mason would "roll." Pet. ex. 2 at 13. However, Mason exhibited still "slight head lag," as well as "slight [decreased] motor skills." *Id.*

Nevertheless, according to Ms. Kay, Mason developed language skills. *See, e.g.*, Pet. ex. 4 at 23. By age "10 months," Mason spoke apparently "[s]ingle words," Pet. ex. 4 at 23; *see also* Pet. ex. 8 at 147, perhaps in both English and in German. *See* Pet. ex. 1 at 17, 82; *see also* Pet. ex. 8 at 147; Pet. ex. 14 at 78-81. Yet, at some point, Mason's language "skills started to decline." Pet. ex. 4 at 23; *see also* Pet. ex. 1 at 15, 17; Pet. ex. 3 at 9; Pet. ex. 5 at 2; Pet. ex. 8 at 147. Ms. Kay believed initially that Mason's speech difficulties "might have been due to a move" from Germany to the United States. Pet. ex. 4 at 23; *see also* Pet. ex. 8 at 147; Pet. ex. 14 at 82.

On April 4, 2001, Mason presented to Cobb Pediatrics in Austell, Georgia, for a "well child" examination. Pet. ex. 1 at 82. A certified pediatric nurse practitioner (CPNP) evaluated Mason. *See id.* The CPNP obtained a medical history that Mason had ceased "talking." *Id.* The CPNP assessed "[s]peech delay." *Id.; see also* Pet. ex. 1 at 1. The CPNP referred Mason to "Early Intervention-Speech." Pet. ex. 1 at 82; *see also* Pet. ex. 14 at 1-2. In addition, the CPNP "discussed speech acquisition" with Ms. Kay. Pet. ex. 1 at 82. Mason received a pneumococcal conjugate (Prevnar) vaccination. *See id.*

Appendix D

A multidisciplinary team comprised of an intake service coordinator, an early intervention specialist and a speech-language pathologist (SLP) associated with the Cobb County Board of Health-Office of Children with Special Needs, Babies Can't Wait program evaluated Mason on May 8, 2001. *See generally* Pet. ex. 14. After testing and observing Mason, the team identified "[a] severe auditory comprehension deficit, a severe expressive communication deficit, significant concerns with social skills including eye contact, attention span, cooperation and interaction, significant concerns with sensory integration skills, and significant concerns with play skills." Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8 (Mason demonstrated "significant recapture, expressive language delays, significant play skills delay, attention issues, [and] social [issues]."). The team concluded that Mason qualified for early intervention services. *See* Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8. The team recommended especially "Speech-Language Therapy as well as Occupational Therapy" and "evaluation by a Developmental Pediatrician." Pet. ex. 14 at 83. For whatever reason, Ms. Kay did not pursue early intervention services for Mason. *See* Pet. ex. 14 at 10.

One full year later, Mason presented to Cobb Pediatrics in Austell, Georgia, for a "well child" examination. Pet. ex. 1 at 69. Mason spoke still apparently "very few words." *Id.* Medical personnel referred Mason for a "speech therapy" evaluation and an "audiology" evaluation. *Id.*

Appendix D

On September 30, 2002, Ms. Kay initiated an "educational planning" assessment for Mason through Cobb County School District Special Student Services. Pet. ex. 8 at 260. An SLP tested Mason. *See* Pet. ex. 8 at 264-68. The SLP concluded that Mason "demonstrate[d] difficulty in his development of both speech and language abilities." Pet. ex. 8 at 266. According to the SLP, Mason's condition rendered Mason "unable to effectively communicate with peers or adults." *Id.* Mason met "eligibility criteria for speech impairment." *Id.*

On October 14, 2002, a "Speech-Language Disorders Peer Review Team" from the Cobb County School District Department of Special Education considered Mason's September 30, 2002 "Speech/ Language Evaluation." Pet. ex. 8 at 263. The team determined that Mason qualified for a "Speech-Language Program" based upon "[a]rticulation" and "[l]anguage" deficits. *Id.* An SLP scheduled a meeting with Ms. Kay to "develop" an "initial [I]ndividualized[E]ducation [P]rogram." *Id.* at 262. The IEP provided 90 minutes of speech-language therapy in a "small group special education setting" each week. Pet. ex. 8 at 256-57.

Subsequent evaluations confirmed Mason's speech-language delays. In February 2003, a preschool educational diagnostician noted during a "Development Educational Assessment" that Mason's "[c]ommunication skills [were] significantly delayed," qualifying Mason for "Significantly Developmentally Delayed" services such as special needs preschool placement. Pet. ex. 8 at 230-

231. Then, in July 2003, a developmental psychologist concluded that Mason exhibited "a qualitative impairment in reciprocal communication" and "in reciprocal social interaction." Pet. ex. 8 at 150. Likewise, in October 2003, a developmental/behavioral pediatrician diagnosed "Developmental Language Disorder." Pet. ex. 8 at 182.

DISCUSSION

Respondent moves to dismiss. *See generally* Respondent's Motion to Dismiss and Response to the Special Master's November 7, 2005 Order (Motion), filed January 9, 2006; Respondent's Renewed Motion to Dismiss (Renewed Motion), filed March 14, 2007. Respondent contends that the statute of limitations contained in § 300aa-16(a)(2) bars the petition. Respondent relies in part upon two reports from S. Robert Snodgrass, M.D. (Dr. Snodgrass), addressing the medical significance of certain notations in Mason's medical records. *See generally* Respondent's exhibit (R. ex.) A; R. ex. C. Dr. Snodgrass is a Professor of Pediatrics and Neurology at Geffen/UCLA School of Medicine. *See* R. ex. B at 1. He is certified in neurology, with special competence in child neurology, by the American Board of Neurology and Psychiatry. *See* R. ex. B at 2.

The Program represents a waiver of sovereign immunity. *See, e.g., Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed.Cir.2007), citing *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed.Cir.2001). Therefore,

the special master must construe "strictly and narrowly" Program provisions. *Markovich*, 477 F.3d at 1360. Under § 300aa-16(a)(2), a petitioner seeking compensation related to an injury associated with a vaccine administered after October 1, 1988, may not file a petition "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset" of the injury. In *Markovich*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) accorded different meanings to the word "symptom" and to the phrase "manifestation of onset." *See Markovich*, 477 F.3d at 1357. According to the Federal Circuit, "either a 'symptom' or a 'manifestation of onset' can trigger the running of the statute, whichever is first." *Markovich*, 477 F.3d at 1357. And, according to the Federal Circuit, " 'the first symptom of manifestation of onset,' for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of" a petitioner's alleged vaccine-related injury "by the medical profession at large." *Markovich*, 477 F.3d at 1360. Thus, the Federal Circuit confirmed that "Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act." *Markovich*, 477 F.3d at 1358.

In May 2001, appropriate professionals found, based upon appropriate testing, that Mason exhibited "[a] severe auditory comprehension deficit, a severe expressive communication deficit, significant concerns with social skills including eye contact, attention span, cooperation and interaction, significant concerns with sensory integration

skills, and significant concerns with play skills." Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8 (Mason demonstrated "significant recapture, expressive language delays, significant play skills delay, attention issues, [and] social [issues]."). Likewise, Dr. Snodgrass opines that Mason displayed "mild motor and substantial communication difficulty at the age of 24-25 months," or in Spring 2001. R. ex. C at 2. Despite adequate opportunity, Ms. Kay did not proffer a medical opinion to rebut either the conclusions from Mason's May 2001 evaluation or Dr. Snodgrass's opinion. *See, e.g., Kay v. Secretary of HHS,* No. 05-0393V, Order of the Special Master (Fed.Cl.Spec.Mstr. Oct. 13, 2006). Mason exhibits still speech-language delays. *See, e.g.,* Pet. ex. 8 at 182; *see also* Pet. at 1.

The special master finds as a matter of fact that Mason showed certainly by May 2001 manifestations of his current condition. Ms. Kay commenced her Program claim on March 23, 2005. *See* Pet. The special master notes that May 2001 is between ten months and 11 months *before* the 36 months preceding March 23, 2005. Therefore, the special master rules as a matter of law that Ms. Kay filed her Program petition beyond the statute of limitations contained in § 300aa-16(a)(2).

The special master *denies* Ms. Kay's motion for a stay pending a potential petition for a writ of *certiorari* in *Markovich. See* Petitioner's Status Report, filed March 2, 2007, ¶ 4. The special master *grants* respondent's motion to dismiss. In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

APPENDIX E — RELEVANT STATUTES

28 U.S.C. 1491(a)(1)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

42 U.S.C. 300aa-11(a)

§ 300aa-11. Petitions for compensation

(a) General rule

(1) A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition containing the matter prescribed by subsection (c) of this section with the United States Court of Federal Claims. The clerk of the United States Court of Federal

Appendix E

Claims shall immediately forward the filed petition to the chief special master for assignment to a special master under section 300aa-12(d)(1) of this title.

(2)(A) No person may bring a civil action for damages in an amount greater than $1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, and no such court may award damages in an amount greater than $1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death and—

(i)(I) the United States Court of Federal Claims has issued a judgment under section 300aa-12 of this title on such petition, and

(II) such person elects under section 300aa-21(a) of this title to file such an action, or

(ii) such person elects to withdraw such petition under section 300aa-21(b) of this title or such petition is considered withdrawn under such section.

(B) If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil

action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.

(3) No vaccine administrator or manufacturer may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988.

(4) If in a civil action brought against a vaccine administrator or manufacturer before October 1, 1988, damages were denied for a vaccine-related injury or death or if such civil action was dismissed with prejudice, the person who brought such action may file a petition under subsection (b) of this section for such injury or death.

(5)(A) A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

Appendix E

(6) If a person brings a civil action after November 15, 1988 [FN1] for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death.

(7) If in a civil action brought against a vaccine administrator or manufacturer for a vaccine-related injury or death damages are awarded under a judgment of a court or a settlement of such action, the person who brought such action may not file a petition under subsection (b) of this section for such injury or death.

(8) If on October 1, 1988, there was pending an appeal or rehearing with respect to a civil action brought against a vaccine administrator or manufacturer and if the outcome of the last appellate review of such action or the last rehearing of such action is the denial of damages for a vaccine-related injury or death, the person who brought such action may file a petition under subsection (b) of this section for such injury or death.

(9) This subsection applies only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program.

(10) The Clerk of the United States Claims Court is authorized to continue to receive, and forward, petitions for compensation for a vaccine-related injury or death associated with the administration of a vaccine on or after October 1, 1992.

Appendix E

42 U.S.C. 300aa-12(a), (d)-(f)

§ 300aa-12. Court jurisdiction

(a) General rule

The United States Court of Federal Claims and the United States Court of Federal Claims special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation. The United States Court of Federal Claims may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded.

* * *

(d) Special masters

(1) Following the receipt and filing of a petition under section 300aa-11 of this title, the clerk of the United States Court of Federal Claims shall forward the petition to the chief special master who shall designate a special master to carry out the functions authorized by paragraph (3).

(2) The special masters shall recommend rules to the Court of Federal Claims and, taking into account such recommended rules, the Court of Federal Claims shall promulgate rules pursuant to section 2071 of Title 28. Such rules shall—

(A) provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions,

(B) include flexible and informal standards of admissibility of evidence,

(C) include the opportunity for summary judgment,

(D) include the opportunity for parties to submit arguments and evidence on the record without requiring routine use of oral presentations, cross examinations, or hearings, and

(E) provide for limitations on discovery and allow the special masters to replace the usual rules of discovery in civil actions in the United States Court of Federal Claims.

(3)(A) A special master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation. The decision of the special master shall—

(i) include findings of fact and conclusions of law, and

(ii) be issued as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C), after the date the petition was filed.

The decision of the special master may be reviewed by the United States Court of Federal Claims in accordance with subsection (e) of this section.

(B) In conducting a proceeding on a petition a special master—

(i) may require such evidence as may be reasonable and necessary,

(ii) may require the submission of such information as may be reasonable and necessary,

(iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary,

(iv) shall afford all interested persons an opportunity to submit relevant written information—

(I) relating to the existence of the evidence described in section 300aa-13(a)(1)(B) of this title, or

(II) relating to any allegation in a petition with respect to the matters described in section 300aa-11(c)(1)(C)(ii) of this title, and

(v) may conduct such hearings as may be reasonable and necessary.

There may be no discovery in a proceeding on a petition other than the discovery required by the special master.

(C) In conducting a proceeding on a petition a special master shall suspend the proceedings one time for 30 days on the motion of either party. After a motion for

suspension is granted, further motions for suspension by either party may be granted by the special master, if the special master determines the suspension is reasonable and necessary, for an aggregate period not to exceed 150 days.

(D) If, in reviewing proceedings on petitions for vaccine-related injuries or deaths associated with the administration of vaccines before October 1, 1988, the chief special master determines that the number of filings and resultant workload place an undue burden on the parties or the special master involved in such proceedings, the chief special master may, in the interest of justice, suspend proceedings on any petition for up to 30 months (but for not more than 6 months at a time) in addition to the suspension time under subparagraph (C).

(4)**(A)** Except as provided in subparagraph (B), information submitted to a special master or the court in a proceeding on a petition may not be disclosed to a person who is not a party to the proceeding without the express written consent of the person who submitted the information.

(B) A decision of a special master or the court in a proceeding shall be disclosed, except that if the decision is to include information—

(i) which is trade secret or commercial or financial information which is privileged and confidential, or

(ii) which are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy,

and if the person who submitted such information objects to the inclusion of such information in the decision, the decision shall be disclosed without such information.

(e) Action by United States Court of Federal Claims

(1) Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision. If such a motion is filed, the other party shall file a response with the clerk of the United States Court of Federal Claims no later than 30 days after the filing of such motion.

(2) Upon the filing of a motion under paragraph (1) with respect to a petition, the United States Court of Federal Claims shall have jurisdiction to undertake a review of the record of the proceedings and may thereafter—

(A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,

(B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or

(C) remand the petition to the special master for further action in accordance with the court's direction.

The court shall complete its action on a petition within 120 days of the filing of a response under paragraph (1) excluding any days the petition is before a special master as a result of a remand under subparagraph (C). The court may allow not more than 90 days for remands under subparagraph (C).

(3) In the absence of a motion under paragraph (1) respecting the special master's decision or if the United States Court of Federal Claims takes the action described in paragraph (2)(A) with respect to the special master's decision, the clerk of the United States Court of Federal Claims shall immediately enter judgment in accordance with the special master's decision.

(f) Appeals

The findings of fact and conclusions of law of the United States Court of Federal Claims on a petition shall be final determinations of the matters involved, except that the Secretary or any petitioner aggrieved by the findings or conclusions of the court may obtain review of the judgment of the court in the United States court of appeals for the Federal Circuit upon petition filed within 60 days of the date of the judgment with such court of appeals within 60 days of the date of entry of the United States Claims Court's [FN1] judgment with such court of appeals.

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42 U.S.C. 300aa-14

§ 300aa-14. Vaccine Injury Table

(a) Initial table

The following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program:

* * *

(b) Qualifications and aids to interpretation

The following qualifications and aids to interpretation shall apply to the Vaccine Injury Table in subsection (a) of this section:

(1) A shock-collapse or a hypotonic-hyporesponsive collapse may be evidenced by indicia or symptoms such as decrease or loss of muscle tone, paralysis (partial or complete, hemiplegia or hemiparesis, loss of color or turning pale white or blue, unresponsiveness to environmental stimuli, depression of consciousness, loss of consciousness, prolonged sleeping with difficulty arousing, or cardiovascular or respiratory arrest.

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(2) A petitioner may be considered to have suffered a residual seizure disorder if the petitioner did not suffer a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convulsion after the administration of the vaccine involved and if—

(A) in the case of a measles, mumps, or rubella vaccine or any combination of such vaccines, the first seizure or convulsion occurred within 15 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit, and

(B) in the case of any other vaccine, the first seizure or convulsion occurred within 3 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit.

(3)(A) The term "encephalopathy" means any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations of encephalopathy are focal and diffuse neurologic signs, increased intracranial pressure, or changes lasting at least 6 hours in level of consciousness, with or without convulsions. The neurological signs and symptoms of encephalopathy may be temporary with

complete recovery, or may result in various degrees of permanent impairment. Signs and symptoms such as high pitched and unusual screaming, persistent unconsolable crying, and bulging fontanel are compatible with an encephalopathy, but in and of themselves are not conclusive evidence of encephalopathy. Encephalopathy usually can be documented by slow wave activity on an electroencephalogram.

(B) If in a proceeding on a petition it is shown by a preponderance of the evidence that an encephalopathy was caused by infection, toxins, trauma, or metabolic disturbances the encephalopathy shall not be considered to be a condition set forth in the table. If at the time a judgment is entered on a petition filed under section 300aa-11 of this title for a vaccine-related injury or death it is not possible to determine the cause, by a preponderance of the evidence, of an encephalopathy, the encephalopathy shall be considered to be a condition set forth in the table. In determining whether or not an encephalopathy is a condition set forth in the table, the court shall consider the entire medical record.

(4) For purposes of paragraphs (2) and (3), the terms "seizure" and "convulsion" include grand mal, petit mal, absence, myoclonic, tonic-clonic, and focal motor seizures and signs. If a provision of the table to which paragraph (1), (2), (3), or (4) applies is revised under subsection (c) or (d) of this section, such paragraph shall not apply to such provision after the effective date of the revision unless the revision specifies that such paragraph is to continue to apply.

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(c) Administrative revision of table

(1) The Secretary may promulgate regulations to modify in accordance with paragraph (3) the Vaccine Injury Table. In promulgating such regulations, the Secretary shall provide for notice and opportunity for a public hearing and at least 180 days of public comment.

(2) Any person (including the Advisory Commission on Childhood Vaccines) may petition the Secretary to propose regulations to amend the Vaccine Injury Table. Unless clearly frivolous, or initiated by the Commission, any such petition shall be referred to the Commission for its recommendations. Following—

(A) receipt of any recommendation of the Commission, or

(B) 180 days after the date of the referral to the Commission,

whichever occurs first, the Secretary shall conduct a rulemaking proceeding on the matters proposed in the petition or publish in the Federal Register a statement of reasons for not conducting such proceeding.

(3) A modification of the Vaccine Injury Table under paragraph (1) may add to, or delete from, the list of injuries, disabilities, illnesses, conditions, and deaths for which compensation may be provided or may change the time periods for the first symptom or manifestation of the onset or the significant aggravation of any such injury, disability, illness, condition, or death.

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(4) Any modification under paragraph (1) of the Vaccine Injury Table shall apply only with respect to petitions for compensation under the Program which are filed after the effective date of such regulation.

(d) Role of Commission

Except with respect to a regulation recommended by the Advisory Commission on Childhood Vaccines, the Secretary may not propose a regulation under subsection (c) of this section or any revision thereof, unless the Secretary has first provided to the Commission a copy of the proposed regulation or revision, requested recommendations and comments by the Commission, and afforded the Commission at least 90 days to make such recommendations.

(e) Additional vaccines

(1) Vaccines recommended before August 1, 1993

By August 1, 1995, the Secretary shall revise the Vaccine Injury Table included in subsection (a) of this section to include—

(A) vaccines which are recommended to the Secretary by the Centers for Disease Control and Prevention before August 1, 1993, for routine administration to children,

(B) the injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines, and

(C) the time period in which the first symptoms or manifestations of onset or other significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines may occur.

(2) Vaccines recommended after August 1, 1993

When after August 1, 1993, the Centers for Disease Control and Prevention recommends a vaccine to the Secretary for routine administration to children, the Secretary shall, within 2 years of such recommendation, amend the Vaccine Injury Table included in subsection (a) of this section to include—

(A) vaccines which were recommended for routine administration to children,

(B) the injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines, and

(C) the time period in which the first symptoms or manifestations of onset or other significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines may occur.

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42 U.S.C. 300aa-15(a), (e)

(a) General rule

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, shall include the following:

(1)(A) Actual unreimbursable expenses incurred from the date of the judgment awarding such expenses and reasonable projected unreimbursable expenses which—

(i) result from the vaccine-related injury for which the petitioner seeks compensation,

(ii) have been or will be incurred by or on behalf of the person who suffered such injury, and

(iii)(I) have been or will be for diagnosis and medical or other remedial care determined to be reasonably necessary, or

(II) have been or will be for rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

(B) Subject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which—

(i) resulted from the vaccine-related injury for which the petitioner seeks compensation,

(ii) were incurred by or on behalf of the person who suffered such injury, and

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

(2) In the event of a vaccine-related death, an award of $250,000 for the estate of the deceased.

(3)(A) In the case of any person who has sustained a vaccine-related injury after attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded, compensation for actual and anticipated loss of earnings determined in accordance with generally recognized actuarial principles and projections.

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond, compensation after attaining the age of 18 for loss of earnings determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy, as determined by the Secretary.

(4) For actual and projected pain and suffering and emotional distress from the vaccine-related injury, an award not to exceed $250,000.

* * *

(e) Attorneys' fees

(1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—

(A) reasonable attorneys' fees, and

(B) other costs,

incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims

on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

(2) If the petitioner, before October 1, 1988, filed a civil action for damages for any vaccine-related injury or death for which compensation may be awarded under the Program, and petitioned under section 300aa-11(a)(5) of this title to have such action dismissed and to file a petition for compensation under the Program, in awarding compensation on such petition the special master or court may include an amount of compensation limited to the costs and expenses incurred by the petitioner and the attorney of the petitioner before October 1, 1988, in preparing, filing, and prosecuting such civil action (including the reasonable value of the attorney's time if the civil action was filed under contingent fee arrangements).

(3) No attorney may charge any fee for services in connection with a petition filed under section 300aa-11 of this title which is in addition to any amount awarded as compensation by the special master or court under paragraph (1).

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42 U.S.C. 300aa-16(a)

(a) General rule

In the case of—

(1) a vaccine set forth in the Vaccine Injury Table which is administered before October 1, 1988, if a vaccine-related injury or death occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury or death after the expiration of 28 months after October 1, 1988, and no such petition may be filed if the first symptom or manifestation of onset or of the significant aggravation of such injury occurred more than 36 months after the date of administration of the vaccine,

(2) a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury, and

(3) a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a death occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such death after the expiration of 24 months from the date of the death and no such petition

may be filed more than 48 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of the injury from which the death resulted.

42 U.S.C. 300aa-21

(a) Election

After judgment has been entered by the United States Court of Federal Claims or, if an appeal is taken under section 300aa-12(f) of this title, after the appellate court's mandate is issued, the petitioner who filed the petition under section 300aa-11 of this title shall file with the clerk of the United States Court of Federal Claims—

(1) if the judgment awarded compensation, an election in writing to receive the compensation or to file a civil action for damages for such injury or death, or

(2) if the judgment did not award compensation, an election in writing to accept the judgment or to file a civil action for damages for such injury or death.

An election shall be filed under this subsection not later than 90 days after the date of the court's final judgment with respect to which the election is to be made. If a person required to file an election with the court under this subsection does not file the election within the time prescribed for filing the election, such person shall be deemed to have filed an election to accept the judgment of the court. If a person elects to receive compensation

under a judgment of the court in an action for a vaccine-related injury or death associated with the administration of a vaccine before October 1, 1988, or is deemed to have accepted the judgment of the court in such an action, such person may not bring or maintain a civil action for damages against a vaccine administrator or manufacturer for the vaccine-related injury or death for which the judgment was entered. For limitations on the bringing of civil actions for vaccine-related injuries or deaths associated with the administration of a vaccine after October 1, 1988, see section 300aa-11(a)(2) of this title.

(b) Continuance or withdrawal of petition

A petitioner under a petition filed under section 300aa-11 of this title may submit to the United States Court of Federal Claims a notice in writing choosing to continue or to withdraw the petition if—

(1) a special master fails to make a decision on such petition within the 240 days prescribed by section 300aa-12(d)(3)(A)(ii) of this title (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and (ii) any days the petition is before a special master as a result of a remand under section 300aa-12(e)(2)(C) of this title), or

(2) the court fails to enter a judgment under section 300aa-12 of this title on the petition within 420 days (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and

(ii) any days the petition is before a special master as a result of a remand under section 300aa-12(e)(2)(C) of this title) after the date on which the petition was filed.

Such a notice shall be filed within 30 days of the provision of the notice required by section 300aa-12(g) of this title.

(c) Limitations of actions

A civil action for damages arising from a vaccine-related injury or death for which a petition was filed under section 300aa-11 of this title shall, except as provided in section 300aa-16(c) of this title, be brought within the period prescribed by limitations of actions under State law applicable to such civil action.

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42 U.S.C. 300aa-22

(a) General rule

Except as provided in subsections (b), (c), and (e) of this section State law shall apply to a civil action brought for damages for a vaccine-related injury or death.

(b) Unavoidable adverse side effects; warnings

(1) No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

(2) For purposes of paragraph (1), a vaccine shall be presumed to be accompanied by proper directions and warnings if the vaccine manufacturer shows that it complied in all material respects with all requirements under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.] and section 262 of this title (including regulations issued under such provisions) applicable to the vaccine and related to vaccine-related injury or death for which the civil action was brought unless the plaintiff shows—

(A) that the manufacturer engaged in the conduct set forth in subparagraph (A) or (B) of section 300aa-23(d)(2) of this title, or

(B) by clear and convincing evidence that the manufacturer failed to exercise due care notwithstanding its compliance with such Act and section (and regulations issued under such provisions).

(c) Direct warnings

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, solely due to the manufacturer's failure to provide direct warnings to the injured party (or the injured party's legal representative) of the potential dangers resulting from the administration of the vaccine manufactured by the manufacturer.

(d) Construction

The standards of responsibility prescribed by this section are not to be construed as authorizing a person who brought a civil action for damages against a vaccine manufacturer for a vaccine-related injury or death in which damages were denied or which was dismissed with prejudice to bring a new civil action against such manufacturer for such injury or death.

(e) Preemption

No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

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42 U.S.C. 300aa-23

(a) General rule

A civil action against a vaccine manufacturer for damages for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, which is not barred by section 300aa-11(a)(2) of this title shall be tried in three stages.

(b) Liability

The first stage of such a civil action shall be held to determine if a vaccine manufacturer is liable under section 300aa-22 of this title.

(c) General damages

The second stage of such a civil action shall be held to determine the amount of damages (other than punitive damages) a vaccine manufacturer found to be liable under section 300aa-22 of this title shall be required to pay.

(d) Punitive damages

(1) If sought by the plaintiff, the third stage of such an action shall be held to determine the amount of punitive damages a vaccine manufacturer found to be liable under section 300aa-22 of this title shall be required to pay.

(2) If in such an action the manufacturer shows that it complied, in all material respects, with all requirements under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.] and this chapter applicable to the vaccine and related to the vaccine injury or death with respect to which the action was brought, the manufacturer shall not be held liable for punitive damages unless the manufacturer engaged in—

(A) fraud or intentional and wrongful withholding of information from the Secretary during any phase of a proceeding for approval of the vaccine under section 262 of this title,

(B) intentional and wrongful withholding of information relating to the safety or efficacy of the vaccine after its approval, or

(C) other criminal or illegal activity relating to the safety and effectiveness of vaccines,

which activity related to the vaccine-related injury or death for which the civil action was brought.

(e) Evidence

In any stage of a civil action, the Vaccine Injury Table, any finding of fact or conclusion of law of the United States Court of Federal Claims or a special master in a proceeding on a petition filed under section 300aa-11 of this title and the final judgment of the United States Court of Federal Claims and subsequent appellate review on such a petition shall not be admissible.